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## THE POLITICS OF INTERNATIONAL ARBITRATION AND ADJUDICATION

*Stephen E. Gent\**

### INTRODUCTION

Disputing states may select from a variety of resolution mechanisms to manage their conflicts—bilateral negotiations, non-binding third-party mediation,<sup>1</sup> or international arbitration and adjudication.<sup>2</sup> Of these mechanisms, arbitration and adjudication have often proven to be the most effective means of producing long-lasting settlements on contentious issues. Despite this fact, evidence indicates that states are generally reluctant to use such legal forms of dispute resolution, especially in resolving issues of national security. To understand when policymakers can and should promote the use of these mechanisms, they need to understand the reasons behind the reluctance of states to use arbitral or legal forums. Recent research provides insight into the political dynamics underlying the use of

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<sup>1</sup> See Kyle Beardsley, [Using the Right Tool for the Job: Leverage and Conflict Resolution](#), 2 PENN ST. J.L. & INT'L AFF. 57 (2013); Scott Sigmund Gartner, [Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds](#), 2 PENN ST. J.L. & INT'L AFF. 27 (2013); J. Michael Greig, [Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation](#), 2 PENN ST. J.L. & INT'L AFF. 48 (2013); Molly M. Melin, [When States Mediate](#), 2 PENN ST. J.L. & INT'L AFF. 78 (2013); Isak Svensson, [Research on Bias in Mediation: Policy Implications](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

<sup>2</sup> U.N. Charter art. 33, para. 1.

international arbitration and adjudication—insights that will aid policymakers charged with resolving such disputes.<sup>3</sup>

International arbitration and adjudication share three general characteristics. First, a third party, not the disputants, determines the terms of any settlement.<sup>4</sup> Second, unlike mediation, states agree to honor the ruling before the third party actually hands down a decision. Finally, the arbitration or adjudication settlements incorporate principles of international law that are not necessarily invoked in other types of negotiations.<sup>5</sup> The two methods primarily differ with respect to the identity of the third party.<sup>6</sup> In arbitration, an individual, state, NGO, or panel of states hands down a decision. On the other hand, adjudication is conducted by an international court, such as the International Court of Justice.

While arbitration and adjudication are often viewed as legal instruments, it is important to view the use of such procedures as being part of a political process. In disputes over contentious issues, states are primarily interested in achieving outcomes that protect their

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<sup>3</sup> See generally Krista E. Wiegand & Emilia Justyna Powell, *Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes*, 55 J. CONFLICT RESOL. 33 (2011); Stephen E. Gent & Megan Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, 55 J. CONFLICT RESOL. 710 (2011); Stephen E. Gent & Megan Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, 28 CONFLICT MGMT. & PEACE SCI. 124 (2011); Stephen E. Gent & Megan Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, 72 J. POL. 366 (2010); Richard B. Bilder, *Adjudication: International Arbitration Tribunals and Courts*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 195-266 (I. William Zartman ed., U.S. Institute of Peace Press rev. ed. 2007); Sara McLaughlin Mitchell & Paul R. Hensel, *International Institutions, and Compliance with Agreements*, 51 AM. J. POL. SCI. 721 (2007); Todd L. Allee, & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 219-234 (2006); Beth Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RESOL. 829 (2002) (describing recent studies in political science on legal dispute resolution of territorial and maritime issues).

<sup>4</sup> Franz Cede, *The Settlement of International Disputes by Legal Means—Arbitration and Judicial Settlement*, in THE SAGE HANDBOOK OF CONFLICT RESOLUTION 358-59 (Jacob Bercovitch et al. eds., 2009).

<sup>5</sup> *Id.* at 360.

<sup>6</sup> See *id.* at 358-75.

own security and economic interests. Thus, even though decisions of arbitration panels or international courts are largely based on legal principles, the initial decision to pursue arbitration or adjudication represents a voluntary, political commitment. The tension inherent in the use of a legal procedure to resolve a political dispute has often constrained the use of arbitration and adjudication in the international system.<sup>7</sup> This article examines how the political frame helps policymakers understand when and why states would be willing to use international arbitration to resolve disputes over contentious issues.

## I. THE EFFECTIVENESS OF ARBITRATION AND ADJUDICATION

Despite a tendency to compare these processes legally to their domestic counterparts, international arbitration and adjudication are carried out in a different environment. Without a global police force, international courts and arbitration panels do not have the same ability to enforce legal rulings as domestic governments. Nevertheless, international arbitration and adjudication have proved remarkably effective. Studies have shown that these legal dispute mechanisms are significantly more successful at resolving international territorial, maritime, and river disputes than other bilateral and third-party conflict management mechanisms.<sup>8</sup> Table 1 presents historical data on the outcome of attempts to settle territorial claims in the Americas and Western Europe collected by the Issue Correlates of War (ICOW) project.<sup>9</sup> Sixty-three percent of the time, arbitration or adjudication ends the claim between the

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<sup>7</sup> JOSEPH PRESTON BARATTA, INTERNATIONAL ARBITRATION: IMPROVING ITS ROLE IN DISPUTE SETTLEMENT 26 (1989). *See generally* F.S. NORTHEGE & MICHAEL D. DONELAN, INTERNATIONAL DISPUTES: THE POLITICAL ASPECTS (1971).

<sup>8</sup> *See* Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 368-69; Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 127-28.

<sup>9</sup> *See generally* Paul R. Hensel, *Contentious Issues and World Politics: The Management of Territorial Claims in the Americas, 1816-1992*, 45 INT'L STUD. Q. 81 (2001); PAUL R. HENSEL & SARA McLAUGHLIN MITCHELL, THE ISSUE CORRELATES OF WAR (ICOW) PROJECT, <http://www.paulhensel.org/icow.html>.

disputants. On the other hand, bilateral negotiations and mediation have a success rate of less than twenty percent. What drives this remarkable difference in success rates?

**Table 1. Effectiveness of Different Conflict Resolution Procedures in Settling Territorial Disputes Between Countries**

	Arbitration and Adjudication	Mediation	Bilateral Negotiations
Did Not End Territorial Dispute	14 (36.8)	116 (81.7)	286 (82.7)
Ended Territorial Dispute	24 (63.2)	26 (18.3)	60 (17.3)
Total	38 (100.0)	142 (100.0)	346 (100.0)

Source: Issue Correlates of War; includes all territorial claims in the Americas and Western Europe, 1816-2001. Percentages in parentheses.

There are several reasons why states are often willing to comply with international arbitration and adjudication despite the lack of traditional law enforcement. First, arbitrators and adjudicators usually use principles of international law as the basis for their decisions. Thus, when a state rejects such a ruling, it is also rejecting well-established legal code. States may respect legal rulings in order to help preserve the general legitimacy of international law. Second, the legality of arbitration and adjudication generates international reputation costs. These rulings are perceived by the rest of the world as being legitimate because they are founded in legal provisions agreed to by the global community.<sup>10</sup> Thus it can damage a country's

<sup>10</sup> See generally Dana D. Fischer, *Decisions to Use the International Court of Justice: Four Recent Cases*, 26 INT'L STUD. Q. 251(1982).

reputation when it chooses to break a binding agreement.<sup>11</sup> Finally, arbitration and adjudication can provide political cover at the domestic level. Domestic constituents and voters may perceive concessions based on international law as being more legitimate than concessions offered in bilateral negotiations.<sup>12</sup> Thus, the arbitral and adjudicative settlements may be more acceptable to a country's population, and disparate constituencies within the country, in the long term than other types of settlements.

## II. THE RELUCTANCE TO USE LEGAL DISPUTE RESOLUTION

While arbitration and adjudication have proven to be highly effective at resolving disputes, states are reluctant to use these procedures. Table 2 presents data on the frequency of different types of settlement attempts of territorial, maritime, and river claims. Arbitration and adjudication combined only make up about six or seven percent of settlement attempts. To understand why methods of international legal dispute resolution are rarely used, one must consider the unique characteristics of these procedures. Unlike bilateral negotiations or other types of third-party diplomatic efforts, arbitration and adjudication require states to give up decision control. Decision control is the "degree to which any one of the participants may unilaterally determine the outcome of the dispute."<sup>13</sup> In binding arbitration or adjudication, an international court or arbitration panel makes the final determination about the terms of any settlement.

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<sup>11</sup> See Mitchell & Hensel, *supra* note 3, at 723-25; Simmons, *supra* note 3, at 843-44.

<sup>12</sup> See Allee & Huth, *supra* note 3, at 222-23; Kyle Beardsley & Nigel Lo, *Third-Party Conflict Management and the Willingness to Make Concessions*, 57 J. CONFLICT RESOL. (forthcoming 2013); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 61-62 (1990).

<sup>13</sup> John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 546 (1978).

**Table 2. Conflict Resolution Attempts by Type and Disputed Issue**

<i>Type of Conflict Resolution Attempt</i>	<i>Type of Disputed Issue</i>			Total Attempts
	Territory	River	Maritime	
Arbitration/Adjudication	38 (7.2)	7 (4.9)	16 (6.0)	61 (6.5)
Other Third-Party Attempt	144 (27.2)	48 (33.3)	89 (3.5)	281 (29.9)
Bilateral Negotiations	348 (65.7)	89 (61.8)	161 (60.5)	598 (63.6)
Total Attempts	530 (100.0)	144 (100.0)	266 (100.0)	940 (100.0)

Source: Issue Correlates of War project. Percentages in parentheses.

The requirement that disputants relinquish decision control makes them reluctant to pursue legal dispute resolution. When deciding whether to pursue legal dispute resolution, states must weigh the trade-off between pursuing an effective conflict management strategy and the costs of ceding decision control to a third party.<sup>14</sup> The following five factors significantly influence the willingness of states to relinquish decision control and pursue arbitration or adjudication:

<sup>14</sup> Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 368-69.

### A. Third-Party Bias

Each party to a dispute will be reluctant to give up decision control to an arbitration panel or court that it believes is biased against its interests.<sup>15</sup> A state may expect that such a biased third party will hand down a ruling that disproportionately favors its adversary. Given that one of the disputants would likely reject any biased third party, disputants are generally only willing to jointly agree to relatively unbiased arbiters or adjudicators.<sup>16</sup>

### B. Salience

States are less willing to cede decision control when negotiating over highly salient issues.<sup>17</sup> An unfavorable ruling on an issue of critical importance would be very costly, as state leaders would be faced with the choice between living with an unpalatable outcome and bearing the costs of reneging on a legal settlement.<sup>18</sup> Given this, it is not surprising that arbitration and adjudication are more commonly used to resolve less salient economic issues such as investment disputes than more salient security issues like territorial control.<sup>19</sup> Moreover, within the universe of territorial and maritime claims, states have been less willing to pursue arbitration or adjudication on highly salient claims, such as those that involve strategically located territory or valuable resources.<sup>20</sup> For example, despite the fact that Colombia and Venezuela have previously used arbitration to resolve a territorial dispute, they have been reluctant to do so over their disputed maritime boundary in Gulf of Venezuela

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<sup>15</sup> *Id.* at 375.

<sup>16</sup> *Id.*

<sup>17</sup> Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 134.

<sup>18</sup> *Id.* at 129.

<sup>19</sup> See Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 730 n.2. See generally Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 124 (2010) (discussing the use of arbitration to resolve investment disputes).

<sup>20</sup> See Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 138.



after the discovery of oil reserves in the 1960s.<sup>21</sup> Similarly, while Malaysia was willing to use the International Tribunal of the Law of the Seas to resolve a maritime dispute with Singapore over land reclamation in 2003, it recently avoided arbitration or adjudication to resolve a disputed claim with Brunei over the rights to offshore oil reserves.<sup>22</sup>

### C. Uncertainty

Uncertainty about potential legal rulings also influences the willingness to pursue arbitration or adjudication.<sup>23</sup> A state will be less inclined to give up decision control if it is highly uncertain as to the terms of the settlement that it should expect from arbitration or adjudication.<sup>24</sup> As the nineteenth-century international law scholar John Bassett Moore noted, “Governments are not in the habit of resigning their functions so completely into the hands of arbitrators as to say, ‘We have no boundaries; make some for us.’”<sup>25</sup> Given this, disputants generally only agree to pursue arbitration or adjudication after they have successfully reached previous functional, procedural, and substantive agreements on the issue at hand that decrease the range of outcomes that could result from legal dispute resolution.<sup>26</sup>

### D. Bargaining Power

The decision to pursue arbitration or adjudication is part of a bargaining process between disputants.<sup>27</sup> On issues of national security, such as territorial conflicts, a state’s bargaining power is

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<sup>21</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 714.

<sup>22</sup> Press Release, Permanent Court of Arbitration, Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Jan. 14, 2005), [http://www.pca-cpa.org/showpage.asp?pag\\_id=1154](http://www.pca-cpa.org/showpage.asp?pag_id=1154).

<sup>23</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 720.

<sup>24</sup> *Id.*

<sup>25</sup> LARS SCHULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* 117 (1998).

<sup>26</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 721.

<sup>27</sup> *Id.*

largely a function of its ability and willingness to pursue its goals through military force.<sup>28</sup> However, once states enter into arbitration or adjudication, this source of power is no longer salient, as the terms of any settlement will instead be a function of the strength of each state's legal claim.<sup>29</sup> Since states with greater capabilities are better able to guarantee favorable outcomes through negotiations or military conflicts, they will be reluctant to opt for legal dispute resolution unless they expect to receive a favorable ruling.<sup>30</sup> For this reason, arbitration and adjudication are less likely when there is a large power asymmetry between disputants.

#### E. Armed Conflict

In general, the costs involved with the militarization of conflict increase the incentive of states to resolve their disputed claims. Thus, it is not surprising that arbitration and adjudication of territorial, maritime, and river claims are more likely when there has been a militarized interstate dispute on the issue in recent years.<sup>31</sup> However, legal dispute resolution is rarely used as part of the peace process of an armed conflict.<sup>32</sup> In these situations, there is often a lack of trust between the disputants that would be necessary for an effective legal procedure.<sup>33</sup> In addition, peace processes usually revolve around multidimensional issues. Thus, disputants are generally reluctant to give up decision control to a legal body during peace negotiations because it reduces their ability to use issue linkage to find a politically acceptable compromise solution to the conflict.

### III. MOVING RELUCTANT STATES TO THE ARBITRAL FORUM

Systematic analysis has shown that arbitration and adjudication can be highly effective methods of resolving contentious

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<sup>28</sup> *Id.* at 719.

<sup>29</sup> *Id.* at 719-20.

<sup>30</sup> *Id.* at 719.

<sup>31</sup> *Id.* at 727.

<sup>32</sup> *Id.* at 713.

<sup>33</sup> See Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 367.

international disputes, but states are often unwilling to pursue such legal procedures. Looking at the choice to pursue arbitration or adjudication as a political decision provides policymakers with concrete strategies to encourage the use of legal dispute resolution. In particular, policymakers should focus on reducing the costs of giving up decision control without undermining the unique benefits of international arbitration and adjudication.

First, policymakers should find the historical shift from arbitration by states to arbitration and adjudication by intergovernmental organizations and courts to be a positive trend. Disputants will likely perceive such organizations and courts as being less biased than state actors, which will decrease the potential costs of giving up decision control. For this reason, policymakers should encourage the use of international courts and instill confidence in the international community that such courts are unbiased. One practical step would be to ensure that the methods used by international courts to select judges for individual cases minimize the possibility of a biased judge, such as a citizen of one of the disputing states.<sup>34</sup>

Second, policymakers can help minimize the costs of giving up decision control by reducing the stakes and the level of uncertainty in arbitration and adjudication. One potential approach to doing this would be to encourage disputants to use incremental or piecemeal binding negotiations to settle portions of their claim.<sup>35</sup> Submitting to arbitration rulings over a series of smaller issues poses less of a risk to disputants than a comprehensive ruling, as it provides the ability to back out at various stages. While such an approach would extend the negotiation process, if it encourages states that would not otherwise do so to enter into a legal dispute resolution procedure, it may prove to be a more effective long-term conflict resolution strategy.

Finally, it is also important to emphasize legal dispute resolution is not a panacea for all conflicts. States have multiple

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<sup>34</sup> Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005).

<sup>35</sup> See Larry N. George, *Realism and Internationalism in the Gulf of Venezuela*, 30 J. INTERAMERICAN STUD. & WORLD AFF. 139, 162 (1988).

avenues—from bilateral negotiations to non-binding mediation to military conflict—to reach settlements over disputed issues.<sup>36</sup> When disputants opt for arbitration or adjudication, they must forgo these other options. Since states with greater bargaining power are able to guarantee themselves favorable outcomes outside of court, they will be reluctant to submit their claims to arbitration or adjudication unless they can expect a similarly favorable outcome. In the maritime dispute with Brunei, Malaysian leaders recognized that they had a weak legal claim and had little chance of a favorable outcome if the case was submitted to arbitration or adjudication.<sup>37</sup> Instead, Malaysia opted for bilateral negotiations in which it was able to use leverage and issue linkage to guarantee itself a future share of the oil and gas revenues in the disputed maritime area.<sup>38</sup>

As mentioned above, a similar desire for flexibility and the need to find compromises over complex, multidimensional issues also makes states reluctant to give up decision control to a legal body during peace negotiations of armed conflicts. The limitations of the use of legal dispute resolution to resolve armed conflict were apparent in the aftermath of the 2000 Algiers Agreement to end the war between Ethiopia and Eritrea, in which the disputants agreed to allow the Permanent Court of Arbitration (PCA) to demarcate their border and arbitrate claims of international law violations.<sup>39</sup> Ethiopia rejected the arbitral decision that awarded the disputed border town of Badme to Eritrea,<sup>40</sup> and the reparations awarded by the PCA were insufficient to resolve the political dispute between the states.<sup>41</sup> Given this, policymakers should focus on more flexible conflict management mechanisms, such as mediation, that allow states to maintain decision control in the immediate aftermath of armed

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<sup>36</sup> See Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 372.

<sup>37</sup> *Brunei and KL to Share Oil and Gas Revenue*, THE STAR ONLINE, June 8, 2010, <http://thestar.com.my/news/story.asp?file=/2010/6/8/parliament/6421375>.

<sup>38</sup> *Id.*

<sup>39</sup> Ari Dybnis, Note, *Was the Eritrea—Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict*, 33 LOY. L.A. INT'L & COMP. L. REV. 255, 259, 263 (2011).

<sup>40</sup> *Id.* at 263.

<sup>41</sup> *Id.* at 270-71.

conflict, reserving arbitration and adjudication for situations in which there is a reduced level of tension between the disputants.

In addition, evidence from territorial disputes indicates that states are less likely to comply with legal rulings that do not reflect the underlying balance of power between the disputants.<sup>42</sup> For example, a militarily superior Argentina rejected a 1977 arbitration settlement of its disputed border with Chile in Beagle Channel.<sup>43</sup> Given its power advantage, the Argentine government found the arbitration ruling unacceptable and hoped to achieve a more favorable outcome through other means.<sup>44</sup> Thus, arbitration and adjudication will be most effective when they produce settlements that reflect the political realities on the ground. Understanding these political factors can help policymakers determine when they should promote the use of arbitration and adjudication, as well as when they should turn to alternative methods of conflict management.

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<sup>42</sup> See STEPHEN E. GENT & MEGAN SHANNON, BARGAINING POWER AND THE USE OF INTERNATIONAL ARBITRATION AND ADJUDICATION 15-16 (Mar. 13, 2011) (unpublished manuscript) (on file with International Studies Association). This version of this paper was presented at the 2011 annual meeting of the International Studies Association in Montreal, Canada (Mar. 16-19, 2011).

<sup>43</sup> See DAVID R. MARES, VIOLENT PEACE: MILITARIZED INTERSTATE BARGAINING IN LATIN AMERICA 136-37 (2001).

<sup>44</sup> See *id.* at 137-38.